No. 2491.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Rialto Irrigation District, a corporation,
Plaintiff in Error,
vs.
N. W. Stowell,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

J. W. Swanwick,
Attorney for Defendant in Error.

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STATEMENT OF THE CASE.

In the statement of the case appearing in the brief of plaintiff in error attention is called to the fact that both parties to the action have sued out writs of error. The plaintiffs in the court below did sue out writs of error which are now pending in this court, but upon more mature consideration of the point involved on those writs, viz.: failure of the court to allow interest upon the overdue coupons, we have come to the conclusion that the lower court was correct in its ruling, and have decided to and do hereby waive our right to

a further prosecution of those writs of error. There remains, then, for consideration by this court, only the points involved in the writ of error prosecuted by the defendant below.

Statutes of Limitations.

Before discussing the authorities cited by plaintiff in error, we think it important to consider first the nature of the bonds in question; and second, the nature of the plea of the Statute of Limitations as applicable to the bonds in controversy.

The bonds here involved were issued under the provisions of the "Wright Act" (Statutes of California, 1887, page 29, *et seq.*). Our contention in the court below and our contention here is that these bonds are payable ONLY from a particular fund. Our contention in that behalf is based upon the fact that under the provisions of the act under which these bonds were issued, a certain fund is provided for which is applicable to their payment. And not only is there no other fund provided for from which they can be paid, but that there is no power vested in the irrigation district by virtue of which it can obtain funds for the payment of bonds except by the creation of what we term the "Particular Fund" out of which the bonds are to be paid.

An irrigation district formed under the provisions of the "Wright Act" is not a municipal corporation in the general sense in which the term is applied generally to municipalities exercising the ordinary func-

tions of government. The title of the original "Wright Act" is as follows:

"An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes."

Under the provisions of the "Wright Act" funds may be acquired by the district in the following manner:

FIRST: By the sale of the duly authorized bonds of the district (section 16, Act of 1887, Statutes 1887, page 36).

SECOND: By the levee of an assessment sufficient to raise interest and principal of outstanding bonds. (Section 22 *id.*)

THIRD: By tolls and charges from persons using the canal for irrigation and other purposes or by levy of assessment, or by both tolls and assessments. (Sections 37 *id.*)

The money so obtained can only be used for the following purposes:

FIRST: That obtained by the sale of bonds for the construction of canals, works, acquisition of property and rights, and otherwise to carry out the effects and purposes of the act. (Section 16, page 36.) Section 37, page 43, specifically provides that the costs and expenses of purchasing and acquiring property and constructing the works and improvements provided for, shall be wholly paid out of the construction fund.

Second: The money obtained from the assessment levied for the purpose of raising funds to pay the interest and principal of outstanding bonds shall be paid into the treasury and should constitute a special fund to be called the "Bond Fund." (Section 22, page 38.) This money shall be used in the payment of the interest and installment coupons of the bonds. (Section 34, pages 41 and 42.)

Third: The moneys received from the tolls and charges or the levy of an assessment provided for by section 37 of the act, are to be used in defraying the expenses of the organization of the district and the care, operation, management, repair and improvement of such portions of the canal and works as are completed and in use, including salaries of officers and employees.

While it is true, as contended by plaintiff in error, that the bonds in suit do not in terms provide that they shall only be paid from a fund which is provided for by the district for their payment, still when the limitations of the district are taken into consideration and the fact that there is no other fund from which they can be paid, the same result is obtained as though it had been provided in terms that the bonds in question should only be payable from the fund that is provided for and is specifically named the bond fund.

We do not think it will be contended that the directors of the district have any other or different powers than those specifically given by the act in question, therefore when they are given the power to raise funds in a certain manner and are given no other

power in that respect, we submit that there is no general power by virtue of which they can raise funds for the payment of the bonds in question.

Counsel for plaintiff in error calls attention upon page 52 of their brief to the fact that the Act of 1897 omits the provisions of the original "Wright Act" which refer to the raising of any special fund and the payment of bonds thereunder. The Act of 1897 contains the following provision:

> "The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and in any year in which any bonds shall fall due must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury and be apportioned to the several proper funds."

The Act of 1897 also provides for the repeal of the original Act of 1887 and the acts amendatory thereto only so far as they may be inconsistent with its provisions. (Statutes 1897, page 287.)

The provision of the Act of 1897 providing for a levy of assessment, and that when collected it shall be apportioned to the several funds, has the effect of continuing the funds provided for by the original act. In other words, what can be termed several funds, used

in the Act of 1897, mean unless there are certain funds to which they can be paid.

Counsel devote a considerable portion of their brief to a discussion of section 312 of the Code of Civil Procedure of the state of California and seem to proceed upon the theory that there is no power in the court to maintain an action unless commenced within the periods prescribed in the title referred to in said section.

Section 312 is as follows:

> "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

Notwithstanding the provision of the foregoing section to the effect that actions without exception can only be commenced within the periods prescribed, the Statute of Limitations has been uniformly construed by the court to be defensive matter. In other words, notwithstanding the provisions of the section quoted, actions can not only be commenced, but can be prosecuted to a successful conclusion unless the defendant by some affirmative act takes advantage of the Statute of Limitations. In short, the Statute of Limitations can always be waived by not pleading the same. Our contention in that behalf is this: that not only can the statute be waived by a failure upon the part of the defendant to take advantage of its provisions after the action has been commenced, but also can be sus-

pended by contract, either express or implied. It will be readily conceded that a defendant could in any case suspend the provisions of the Statute of Limitations by entering into an express contract for that purpose. If the defendant can expressly suspend the provisions of the Statute of Limitations, it necessarily follows that it can also suspend the same by such conduct or such a line of action which would amount in law to either an estoppel or an implied contract on its part.

The cases involving the particular fund doctrine hereinafter discussed are based upon the theory that the Statute of Limitations is suspended, does not run, and cannot be pleaded during the time that the debtor neglects to perform the special duty imposed upon it of providing the particular fund by taxation—to compel the performance of which duty would require the court to supervise the conduct of all persons charged with any official duty in respect to the levy, collection or disbursement of the taxes in question, until the bonds, principal and interest, were paid in full, which, as the court says in Freehill v. Chamberlain, would place it in the power of a municipality in many cases to avoid all payment of its debts, as by concert of action each officer might omit to perform his duty, and the time consumed in compelling each to perform might be made to consume all the period of the statute before the funds would reach the treasury.

The case at bar comes within the reason of the rule. The law has imposed upon the Rialto Irrigation District a certain duty; that is, the duty of providing a particular fund for the payment of all its bonds

which are properly issued and outstanding. Until it has performed this duty by providing the fund for such payment, it is not entitled to the benefits of the Statute of Limitations.

Lincoln County v. Luning, 133 U. S. 529, 33 L. Ed. 766.

The action was upon certain bonds and coupons issued under the Funding Act of Nevada of 1873 (Statutes of Nevada 1873, page 54; Compiled Laws of Nevada (addition of 1873), volume 2, page 518). In commenting upon this case, counsel for plaintiff in error say (page 79 of their brief):

"It will be seen that the Act of 1873, authorizing these bonds, provided for a *special tax* to be levied annually and placed in a fund to be used *only* for the payment of the interest. It is evident from the case, that if the Act of 1873 had been all that had been done relative to these bonds, the Statute of Limitations would have been applicable."

We agree with the concluding statement in the above quotation, but not because the special fund provided for by the Act of 1873 was to be used *only* for the payment of the interest. Section 8 of the Act of 1873 does provide for the levy and collection of a special tax to be called the "Interest Tax," of forty-five cents on each one hundred dollars of taxable property, etc., and the same section also contains a provision to the effect that the fund derived from this tax shall be applied only to the payment of the in-

terest of the bonds, but the Act of 1873 also contains the following provision:

> "Section 9. It shall be the duty of the county treasurer of Lincoln county to make such arrangements for the payment of the interest of said bonds when the same falls due; at least thirty days before the time of payment; and in the event said interest fund is insufficient, the treasurer shall draw on the general fund of the county for such purpose; and in the event that said fund shall prove inadequate, the said treasurer is authorized and required to make such contracts and arrangements as may be necessary for the payment of said interest, and for the protection of the credit of the county of Lincoln."

This statute contains what we consider a clear illustration of the difference between a general obligation of a public corporation and an obligation payable only out of a special fund created for the purpose of such payment. While it is true that under the provisions of the Nevada Statutes of 1873 a special fund was created which was to be used only in the payment of the interest upon the bonus in suit, it is also true that the same act contained appropriate provisions for the payment of these same obligations from general sources. In other words, the obligation assumed by the county upon the sale of the bond was that it would provide a special fund for the payment of the interest coupon by the levy of the special assessment provided for in the act, and that failing to do so, it would pay the same obligation out of its general funds. Thus was a clear case of an obligation to pay first out of

a special fund and second generally. By the Act of 1877 a different condition arose:

The Supreme Court, referring to that act, says:

> "This act provided for the registration of the coupons and their payment in a particular order, was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the Statute of Limitations until he shows that that fund has been provided."

Where the Supreme Court says: "That it amounted to a promise on the part of the county to pay such coupons as were registered," and such promise was by the "creditor accepted," the court recognizes that a new contract had arisen between the county and the creditor by which the creditor could safely wait.

Applying the principles of the Luning case to the case at bar, we say: the contract between the bondholder and the county of Lincoln at the time of the original sale of the bonds was different from the contract between the district in this case in that in the

former the bondholder acquired a general obligation of the county and in the latter an obligation which could only be payable out of the special fund provided for in the only act whereby the district acquired the power to issue the bonds in suit. The provisions of the Wright Act became part of the contract between the bondholder and the district. (Cite authority.)

The bondholder must have known that the only way by which he could collect his bond was through the way provided for in the act, viz., by the bond fund, and the district, by taking his money, should, by all principles of common honesty and justice, be estopped from taking advantage of its own failure to comply with the terms of a contract entered into freely and for its own benefit. Again, by the Act of 1877 and the creditor's acceptance of the same by the registration of his bonds, the contract between the municipality and the creditor became one similar in all essential respects to the contract between the parties here.

The Supreme Court says in the Luning case (reference to the Act of 1877):

> "As it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait."

We have utterly failed to grasp the real significance of the Wright Act if it does not also provide a special trust fund for the payment of the obligations

authorized by its terms to which the bondholder might look and for which he might safely wait.

The case of Shoenhoeft v. Kearny County, 92 Pac. 1097, furnishes an excellent illustration of what we consider the difference between ordinary municipal bonds and obligations of a public corporation payable out of a special fund, our contention being that the bonds in suit belong to the latter class.

We invite the particular attention of the court to the quotation from Shoenhoeft v. Kearny County, *supra,* appearing on pages 84 to 89 of the brief of plaintiff in error. The court is there discussing the difference between bonds and warrants, and says:

> "Although warrants may take the form of negotiable paper, and be made payable at a specific date, they are not negotiable in a commercial sense, belong in a class by themselves, and are fundamentally different from the ordinary municipal bonds and coupons representing installments of interest upon such bonds."

The court there notes the fact that though the warrants which it is there considering are payable at a specific date, they are not negotiable in a commercial sense, and that they are fundamentally different from the ordinary municipal bonds, so we say in reference to the bonds here involved, though they are payable at a specific date, they are not negotiable in a commercial sense and they are different from the ordinary municipal bonds in the sense that they are not issued by an ordinary municipal corporation and are only

payable from the special fund provided by law for their payment.

Counsel refer to the fact that the Wright Act provides that the bonds issued in accordance with its provisions shall be negotiable in form. They therefore draw the conclusion that if the bonds in question are not negotiable, they are void under the provisions of the Wright Act. All that the Wright Act provides for in this behalf is that the bonds issued shall be negotiable *in form.* As to whether or not they are negotiable instruments as a matter of fact, is entirely a different question. The fact that the legislature in terms provided that the bonds shall be negotiable in form and did not provide that they should be negotiable instruments, clearly shows the distinction.

Continuing our comments on the quotation from the Schoenhoeft case, the court says: "All warrants must specify out of what fund they are payable." While there is nothing upon the face of the bonds in suit here indicating what fund they are payable from, the provisions of the act under which they were issued provide the fund from which they are payable, and, as that act becomes part of the contract between the bondholder and the district, they do thus provide or specify the fund from which they are payable. The court further says:

> "Under this statute, warrants are simply drafts on anticipated revenue (citing cases), which, whatever the form or expressed date of maturity, are not, in law or in fact, payable except as from

> time to time money to meet them is received into the specific fund of the treasury upon which they are drawn."

So, in the case at bar, these bonds are merely drafts on anticipated revenue, and are not, in law or fact, payable except as money is received into this specific fund of the treasury upon which they are drawn, viz.: they are not payable in the sense that there is anything from which they can be paid. It is true that like warrants they are payable at specific dates; they are payable in terms upon a certain date, but when we consider the real contract, which contract is evidenced not only by the bonds in suit but also by the statute under which they were issued, then the fact that they are not payable, in law or in fact, upon the date indicated upon their face, except or provided that there is money in the specific fund, becomes apparent.

The court in the case under consideration goes on to say:

> "A judgment upon a warrant merely establishes the claim against the municipality, and it is still payable only in the order of its registration from the fund designated for the purpose."

We wish to call particular attention to this language. The only judgment which we can obtain in this action is a judgment establishing the validity and amount of the indebtedness represented by the bonds in suit. It is not a judgment upon which an execution will lie in any general sense, but only a judgment which may be the basis of another proceeding for the

purpose of obtaining the money for its satisfaction. The analogy between the kind of judgment which may be obtained upon the warrant which the court is discussing in the case under consideration and the judgment which may be obtained in the case at bar is perfect.

In the case under consideration the court in discussing the bonds there in suit, which were held to be general obligations of the municipality, goes on to say:

> "True, a fund must be created by taxation to meet coupons representing the interest upon bonded indebtedness, but no particular fund is, at the time of their issue, expressly pledged in advance to their payment, and, *whether or not money has been raised to meet them, they are due and payable absolutely* upon the stated days of their maturity."

Perhaps the above quotation furnishes as apt an illustration of the point we are making as it would be possible to find. If our contention be correct that a particular fund was provided for by the terms of the contract under which these bonds were issued (which contract includes not only the bonds themselves but the statute under which they were issued), a particular fund which was at the time of their issue expressly pledged in advance to their payment, then the difference between a general municipal obligation payable out of the general fund of the municipality and the obligation evidenced by the bonds in suit is complete.

Again the court says: "Unless the circumstances be decidedly exceptional, bonds and their attended

coupons mature according to contract." Again our point is made clear. What is the contract under which these bonds were issued? Is it merely the contract expressed upon the face of the bonds or does the statute under which the bonds were issued enter into and form a part of that contract?

We have extended our discussion of the Shoenhoeft case for the purpose of emphasizing our position. It is not necessary to take up the time of the court with the further discussion of this point. Many cases are cited in the brief of plaintiff in error based upon the same theory which is elaborated in this Shoenhoeft case. We have selected this case for particular discussion on account of the prominence to which it is given in the brief of counsel and also because the quotation from the case contained in that brief furnishes so clearly an illustration of the difference between the general municipal security or the municipal security payable out of the general fund of the municipality and the specific obligation of a public corporation fund *to be* created for the purpose of meeting this obligation.

The bonds of irrigation districts are similar to improvement bonds payable from assessment only. In speaking of this class of bonds in Dillon on Municipal Corporations (vol. II, sec. 893, p. 1390, 5th Ed.) the author says:

> "But if the enabling act does not in express terms limit the power of the municipality to an issue of bonds which are payable only from the special assessment or other designated fund, or

> if the municipality, besides having power to issue bonds under a statute so limiting its liability, has also power to issue its general obligations, a bond which by its terms is the direct and absolute promise of the municipality to pay a definite sum of money with interest and is not declared to be payable only from the fund, is the general obligation of the city, payable from its general funds or general power of taxation."

If the converse of this proposition be true, then if the municipality has no power to issue its general obligations, the bonds in question cannot be general obligations of the district and cannot be payable out of a general fund which has no existence.

In an attempt to distinguish the case at bar from other particular fund cases, plaintiff in error calls attention to the fact that the present action is one to recover a money judgment, whereas, they say, in the particular fund cases no money judgment could be recovered because the debtor could not be sued and, therefore, this cannot be a particular fund case—that the particular fund doctrine has been applied only to cases where the debtor could not be sued and where the writ of mandate to compel payment by the treasurer was the only remedy.

Does the right to sue the Rialto Irrigation District and obtain a judgment on these bonds afford a remedy which brings the holders of the bonds any nearer to the recovery of their money than were the holders of the bonds in any other particular fund cases who, counsel say, did not have such right to sue? It clearly

does not. No personal judgment can be recovered against the plaintiff in error on these bonds. The judgment in this action amounts to nothing more than did the legislative actions which determined the validity and amount of the bonds in other particular fund cases, such as Freehill v. Chamberlain, *supra,* where the court says:

> "It was not necessary that these coupons should have been presented to or allowed by the auditor and board of trustees; they did not constitute demands within the meaning of sections 9 and 10 of the Act of April 25, 1863; neither the auditor nor the board of trustees had any discretion or authority to reject them or prevent their payment; *the statute under which they were issued established them as debts to be paid.*"

Counsel here recognize the fact that no general judgment can be recovered here. We quote from their brief in the court below:

"An irrigation district does not own property which is subject to execution. It holds such property in trust for the inhabitants of the district and it cannot, therefore, be taken under execution issued upon a judgment. The mere fact, therefore, of getting a judgment upon bonds against the district does not place the owner of such judgment in a position which would be equivalent to the ability to recover his money. If there is no money in the treasury, the judgment cannot be enforced except by resort to mandamus to compel the levy of taxes sufficient to raise the amount of his judgment. * * *" (Page 44.)

The nature of the judgment to be recovered in this action has been recognized by the federal courts so often that a brief reference to the authorities upon that question is all that can be necessary.

In the case of Waite v. City of Santa Cruz, 89 Fed. 619, Justice De Haven, in speaking of the nature of an action in some respects similar to this, uses the following language, which we quote for the purpose of showing the nature and effect of the judgment to be here recovered:

> "In Heine v. Commissioners, 19 Wall. 655, the Supreme Court, speaking by Mr. Justice Mille, point out that upon the refusal of a municipal corporation to pay its bonds the appropriate way to proceed in the federal courts is to first sue at law, and obtain a judgment establishing the validity of the bonds, and then, if necessary, obtain a mandamus to enforce the judgment. This course was followed and upheld in the following, among many other cases which could be cited: Commissioners v. Aspinwall, 24 How. 375; Von Hoffman v. City of Quincy, 4 Wall. 535; Riggs v. Johnson Co., 6 Wall. 166; Walkley v. City of Muscatine, *Id.* 481. A consideration of these cases, as well as section 629, Rev. St. U. S., above cited, leads to the conclusion that the present action is clearly within the jurisdiction of the court."

Plaintiff in error cites the case of Barnes v. Glide, 117 Cal. 1, as authority for the proposition that the statute of limitation runs against the right of a writ of mandate to compel a levy of taxes to provide funds

for the payment of obligations payable from a particular fund. All that the court decided in that regard was that the statute ran against the right to a mandate under the facts as they existed in that particular case, as the defendants there came within the general rule that a municipal corporation has the right to avail itself of the defense of the statute of limitation as fully as any other debtor. There were no facts in that case bringing it within the "particular fund" doctrine, and the court so distinguishes it from the case of Freehill v. Chamberlain, *supra,* in which, as the court says, the bondholders were to rely exclusively upon a certain special fund distinct from the general fund, and from all other funds of the city. The swamp land district involved in Barnes v. Glide, according to the facts stated in the briefs in that case, was organized on the 18th day of September, 1877, under part 3, title VIII, chap. art. II, Political Code, particularly under sections 3446, 3447, 3449, 3450, 3451, 3452, 3453 and 3483. The court held with respondents, whose contentions that no particular fund existed was stated in their brief as follows (page 14):

"Are the funds of a reclamation district, in the custody of the county treasurer, special in the same sense that no action against such district to recover on a warrant drawn on its treasury can be had until there is money in such fund to pay such warrant?

"A reclamation district is a single entity in that respect like a city, county or state.

"There is no provision in the charter of such dis-

tricts (Pol. Code) authorizing it to raise funds for any special purpose.

"All assessments on the lands of a district are levied in a certain way, and they go into the county treasury and constitute a single fund against which all its warrants are drawn.

"In one sense all funds of any municipal corporation are special, *i. e.,* specially devoted to the payment of warrants drawn on its treasury, and to this the funds of a reclamation district constitute no exception.

"But the special fund for the payment of a debt which will suspend the running of the statute of limitations must be created by, or in the interest of, the creditor for the payment of the particular debt."

1 Wood on Lim., Sec. 127.

(Page 24):

"Much stress is placed by counsel (p. 55) on the words in the several warrants described in the complaint, 'from the swamp land fund in the treasury of said county to the credit of said district No. 307.'

"That fund constitutes all the moneys in the county treasury belonging to that district, and the order drawn on the treasury is in legal effect a general order on the treasury, to be paid out of the funds standing to the credit of the district. Those words do not make a special fund out of what is necessarily the only fund possible under the statute. To constitute a fund special within the meaning which will prevent the operation of the statute of limitation, it must be set apart from the other funds of the municipality and must be held

by it in trust specially for the particular warrants drawn on that particular fund." (Citing Lincoln Co. v. Lunning, Underhill v. Sonora, and Freehill v. Chamberlain.)

The contention is made here that if the creditor can compel the creation of the fund by mandamus to the proper officers to levy the necessary tax, then the particular fund rule does not apply, and counsel would have us believe that in the case of Freehill v. Chamberlain, *supra,* in which the particular fund rule was applied, the bondholders could not have compelled the levy of the tax, but had only the remedy of mandamus against the treasurer when moneys were in the fund. They quote in support of their contention the language of the Supreme Court in Barnes v. Glide, as follows:

> "Appellant relies greatly on Freehill v. Chamberlain, 65 Cal. 603; but that case is not pertinent to the case at bar. That case was simply mandamus to the treasurer of the city of Sacramento to compel him to pay the interest on certain bonds. Those bonds had been issued by the city under the Act of April 24, 1858 (Statutes of 1858, p. 280), which has frequently been held by this court to constitute an express contract between the city and the bondholders, by which the latter were prohibited from suing the city, and were to rely exclusively upon a certain special fund distinct from the general fund and from all other funds of said city. The only remedy which the bondholders had was mandamus against the city treasurer to compel him to pay the interest on the bonds when there was money in the fund to which

they could alone look under their special contract; and all that the court decided in Freehill v. Chamberlain was that no cause of action in mandamus against said treasurer had accrued until there was money in said fund, and that consequently the statute of limitations did not commence to run while there was no money in said fund with which the treasurer could pay said interest. It was not a proceeding which might have been commenced fifteen years before it was instituted."

By this language the Supreme Court was distinguishing the case of Freehill v. Chamberlain. Without saying in so many words that the case it was then deciding did not involve a particular fund (as we have shown that it did not), the court distinguished the two cases by pointing out that Freehill v. Chamberlain was a particular fund case. Counsel lay great stress upon the one sentence, "The only remedy which the bondholders had was mandamus against the treasurer, etc." Upon this last comment of the Supreme Court, which is mere dicta, counsel rely for the true meaning of the decision in Freehill v. Chamberlain. A study of Freehill v. Chamberlain will show that this sentence is erroneous when taken alone, and can only mean, when read with the entire paragraph of which it forms part, that the statute of limitations would only run against the right to mandamus the city treasurer to pay when there was money in the fund, as that was the only remedy by which the fund, when provided, could be directly appropriated by the bondholders to the payment of their claims. But that was by no means the

only remedy which the bondholders had. They could have compelled the levy of a tax to replenish the fund. The statute under which the bonds and coupons involved in Freehill v. Chamberlain were issued established them as debts to be paid, and no general judgment could be recovered against the city upon them. But it was made the duty of the supervisors under section 34 of the act authorizing the issuance of those bonds (Stats. 1858, p. 280) to

> "levy, for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of one hundred cents on the one hundred dollars. * * *."

This being a duty enjoined by law, mandamus would lie to enforce its performance. The mere fact that the city could not be sued and a general judgment obtained against it would not prevent a proceeding in mandamus *against its officers* to compel the levy of the tax. Such a similar contention was made in the case of McCauley v. Brooks, 16 Cal. 11, where Chief Justice Field in passing upon the contention that mandamus would not lie to compel the state controller to issue a warrant because the state itself could not be sued upon its debt, said:

> "The truth is, no officer, however high, is above the law, and when duties are imposed upon him in regard to which he has no discretion, and in the execution of which individuals have a direct pecuniary interest, and there is no other plain, speedy and adequate remedy, he can be required to perform those duties by the compulsory process

of mandamus. This is the settled doctrine not only of the federal courts, but of the highest tribunal of nearly every state in the union where the question has been raised." (Page 41.)

How, we ask, does it happen that mandamus would lie to compel the treasurer in Freehill v. Chamberlain to pay from the moneys in the fund, and yet (according to counsel's view) would not lie to compel the supervisors to levy the tax to provide that fund? Without seeking further for the merits of the point—it has none—it suffices to call the court's attention to the fact that the Supreme Court of California held directly in a case decided a few days before the decision in Freehill v. Chamberlain that mandamus did lie to compel the supervisors to levy the tax and provide the funds for the payment of bonds and coupons of the very issue involved in Freehill v. Chamberlain. The case is entitled Meyer v. Brown, and is reported in 65 Cal. 583. In that case the court, speaking through Mr. Justice Ross, say:

"The bonds carried with them the pledge of an annual tax for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, of one hundred cents on the one hundred dollars, fifty-five per cent of which to be set apart and appropriated to an interest and sinking fund, to be applied to the payment of the annual interest upon the bonds, and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds for whose payment, with

interest, provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made as solemn and binding and as much beyond subsequent legislation as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the Supreme Court of the United States, in a case entitled Louisiana v. Pillsbuy, reported in 105 U. S., p. 278. It is well occasionally to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value, than there is to permit an individual to do so. Good faith, and fair dealing should be exacted of the one equally with the other. * * * *It is therefore ordered that a writ of mandate issue to the municipality, and its authorities annually to levy and collect for municipal purposes on all real and personal property, etc."*

The very contentions made here by plaintiff in error were made by respondent and passed upon by the Supreme Court in the case of Freehill v. Chamberlain. We quote from the brief of respondents in that case (page 10):

"If the petitioner was not permitted to sue the city for the purpose of obtaining a money judgment, we apprehend that there were at all times other remedies to which he could resort, and that the failing to resort to them within four years from the time he became entitled to them, he is barred by the provisions both of section 337 and of section 343 of the Code of Civil Procedure. At any time after 1872 the remedy by

mandate against the treasurer was as speedy and adequate as it is now. If taxes were not levied he had his remedy by mandate to compel their levy. If levied and not paid into the proper funds, he had the same power to compel their proper appropriation. By section 35 of Statutes 1858, page 279, and section 26, Statutes 1863, page 426, 55 per cent of all revenues derived from and within the city limits for municipal purposes were required to be set apart for the payment of petitioner's debt, and he had a remedy to have it so set apart. This was clear from the words of the statute, and has recently been so decided by this court in Meyer v. Brown, No. 8896, filed September 28th, 1883."

And again, on page 9, after contending that since the city could not be sued, it could not be reached indirectly by proceedings against its officers, the respondents in that case said:

"But if we are mistaken in the foregoing views, and the petitioner is entitled to bring his action, or to proceed by way of writ of mandate, then he has been thus entitled for ten years or more before filing his petition herein. This is an action on a written contract and is barred by section 337 Code of Civil Procedure.

"If not barred by section 337, the petitioner is barred by section 343 Code of Civil Procedure, which declares that

> 'an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.'

The word 'action' as here used includes special proceedings. Code of Civil Procedure 363."

Counsel also lays great stress upon the fact that in the case of Barnes v. Glide, in referring to and distinguishing the case of Freehill v. Chamberlain, *supra,* the court says:

> "It was not a proceeding which might have been commenced fifteen years before it was instituted."

The court here refers to the mandamus proceeding against the treasurer in Freehill v. Chamberlain, which it had decided would outlaw four years after the fund had been provided. The court was not referring to the remedy of the petitioner in Freehill v. Chamberlain to a mandate to compel the levy of the tax, because the court in the latter case held that the statute would not run against that remedy. The undisputed facts as set out in the briefs on file in Freehill v. Chamberlain show that for ten years the levy had not been made as the act provided, during all of which time the statute was suspended. It would necessarily follow that if the statute of limitation had been running against petitioner's remedy in Freehill v. Chamberlain to compel the levy of the tax, then his bonds would have been outlawed—which was not the ruling of the court.

Barnes v. Glide was not a particular fund case, as we have already pointed out, and therefore the statute was not suspended as in Freehill v. Chamberlain against the remedy to compel the levy. No particular fund had been pledged to the exclusive payment of the

warrants in Barnes v. Glide, and the petitioner there had no right to wait fifteen years before instituting his proceeding.

It is clear to be seen that the entire proposition now contended for by counsel was before the court in the case of Freehill v. Chamberlain, and the court there held that the statute would not commence to run until the city had performed its duty and placed the funds in the treasury, and says:

> "The contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because, if by concert of action each officer should omit to perform its duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the legislature intended such result."

Counsel say that all that the Supreme Court decided in Freehill v. Chamberlain was that the right to mandamus the treasurer to pay out the moneys in his hands was not barred. Do counsel mean to infer that the remedy, which we have heretofore shown the bondholders there had, of compelling the levy of a tax by mandamus was or might have been barred? If such be their meaning, the result as applied to the bonds in the case at bar would be that the district might prevail here today, but, if funds came into the hands of the treasurer of the district tomorrow, our right to mandamus him to pay these very bonds would not be barred by the statute. The mere statement of

the proposition demonstrates its absurdity. If the bonds involved in Freehill v. Chamberlain had been outlawed because of the failure of the petitioner there to follow any one remedy, no other remedy would have been available as against the plea of such bar. But the court specifically held that the statute did not run against the right to levy the tax by mandamus and did run only against the right to mandamus the treasurer when he had moneys in the fund to which the petitioner might look for payment.

San Francisco Savings Union v. Reclamation District, 144 Cal. 649.

Counsel say that the decision in Barnes v. Glide has become a rule of property, and he quotes at some length from the case of San Francisco Savings Union v. Reclamation District, 144 Cal. 649, a case which followed and was based upon Barnes v. Glide. The case was brought upon warrants identical with those in Barnes v. Glide. No particular fund had ever been pledged to their payment. The Supreme Court affirmed the decision that the warrants were outlawed. We quote from respondent's brief in that case (pages 56-57):

"Counsel's contention that the warrants in the case at bar are payable out of a special fund is an assumption not warranted by the facts. The district has but one fund. All moneys of the district collected, for whatever purpose, must be paid into this, the general and only fund.

Pol. Code 3454-5-6.

"This fund may be said to be special as to the county, but not as to the district. It is only put into the county treasury for convenience's sake and to save expense; but it is the only fund of the district. It could not possibly be more general."

In commenting upon the position of the plaintiff in the lower court, counsel for plaintiff in error here make the following statement on page 119 of his brief:

"Unlike the cases of Sawyer v. Colgan and Freehill v. Chamberlain, where the plaintiffs had no "remedy" whatever, here in the case at bar a number of courses have been open to the defendant in error ever since the maturity of these coupons, to-wit."

Counsel thereupon indicate that we might have sued upon the coupons in the federal court upon their maturity, or might have done the same thing in the state court, and if no funds were available, we could have obtained a writ of mandate to compel a levy of sufficient taxes to yield such funds. The plaintiff in Freehill v. Chamberlain could have instituted his mandamus proceeding, the same as in Meyer v. Brown, against the proper officers to compel the levy and collection of the tax which would have resulted in the payment of the necessary fund into the treasury. We submit, therefore, that instead of being *unlike* the case of Freehill v. Chamberlain, we are here in exactly the same position that Freehill v. Chamberlain was in and that a like ruling should follow here on the question of the statute of limitations.

Sawyer v. Colgan, 102 Cal. 283, held directly that

it is a general rule that when payment is provided for out of a particular fund or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued. While it does not appear from the facts set forth in that case that any right existed on the part of the plaintiff to enforce the payment of his claim by a mandate to compel the levy of taxes therefor, at the same time the court clearly recognizes the rule for which we are contending and cites County of Lincoln v. Lunning, 133 U. S. 529, and Freehill v. Chamberlain, 65 Cal. 603, in support of the same.

The leading authority on the point that the Statute of Limitations does not commence to run until the particular fund has been provided is Lincoln v. Lunning, 133 U. S. 529, 10 Sup. Ct. 363, where the Supreme Court said:

> "The remaining question arises on the Statute of Limitations. By the general limitation law of the state, some of the coupons were barred; but there has been this special legislation in reference to these coupons. The bonds were issued under the Funding Act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the Act of 1873. This amendatory act provided for the registering of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto, in the order of their registration. St. Nev. 1877, p. 46. The coupons, which by general limitation law would have been barred, were presented, as

they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the Act of 1877; and, from the time of their registration to the commencement of this suit, there was no money in the treasury applicable to their payment. This act provided for registration and for payment in a particular order was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and, when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the Statute of Limitations until he shows that that fund has been provided."

The Supreme Court of California passed directly upon this point in the case of Freehill v. Chamberlain, 65 Cal. 603. In that case it was contended that as the coupons in question matured on their face at a date prior to the commencement of the action, the Statute of Limitations barred any proceeding to enforce their payment; and that if the proper amount of taxes were not levied in any one year, such levy should have been

compelled by mandamus. The court in reply to this contention said:

"We do not understand this to be the law as applicable to this case. According to the Act of April 25, 1863 * * * no action could be maintained against the city on these bonds or coupons. By law, it was the duty of the city to make provision for the payment of the bonds and coupons according to the statute under which they were issued; and, by omitting to perform such duty, the city could not create the defense of the Statute of Limitations. Not until the funds were in the treasury, properly applicable, would the statute begin to run. Not until that period would the petitioner have any right of action or proceeding against the treasurer. The contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because, if by concert of action, each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the legislature intended such result."

"It is a general rule that where payment is provided for out of a particular fund or in a particular way, the debtor cannot plead the Statute of Limitations without showing that the particular fund has been provided or the method pursued."

25 Cyc. 1068.

"Where it is provided by law that state or county bonds or the interest coupons thereon, or other municipal obligations shall be payable out

of a particular fund or in a particular manner, the Statute of Limitations does not begin to run unless it appears that the particular fund has been provided or the method pursued."

25 Cyc. 1103.

"When payment is provided for out of a particular fund to be created by the debtor, he cannot plead the Statute of Limitations until he shows that fund has been provided."

Wood on Limitations (third edition 1901), section 127.

The Circuit Court of Appeals of the Ninth Circuit in the case of Robertson v. Blaine County, 90 Fed. 63, in passing upon this point in a similar case, said:

"But there is another principle which we also believe to be applicable to this case which leads to the same result. The bonds and coupons herein sued upon were, by the statute authorizing their issuance, payable out of a particular fund, which was never provided for by Alturas county. The provisions of this statute imposed a continuing duty (citing authority) and became a part of the contract between Alturas county and its bondholders (citing authorities). The facts alleged in the complaint bring this case within the general rule that, when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the Statute of Limitations without first showing that the particular fund has been provided, or that the particular method has been complied with."

In Berkey v. Board of Commissioners, 48 Colo. 104, 110 Pac. 197, the court says:

"Besides, on principle and authority, where payment is provided for in a special way, and out of a particular fund, with the affirmative duty upon the defendant to provide that fund, and make application of it as required by law, he may not set up and rely upon the Statute of Limitations until he first shows that he has complied with the terms of the statute, and is himself within the law. This principle is recognized in all of the cases, and upon it the decisions are in harmony."

"Neither at the time of the maturity of the bonds nor at any subsequent date, has there been in the county treasury, or any other place of payment named in the bonds, sufficient money to pay those held by the plaintiff. There is no claim to this effect, hence the defendant is not in position to rely upon and apply the limitation statute."

Each of the bonds sued on herein contains a recital to the effect that it is one of a series issued by authority of and pursuant to the requirements of the Wright Act (title of the Wright Act being quoted in full in the bond), and each bond contains a further recital, as follows:

"All the said bonds and interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is and the said bonds are by said act of the legislature made a lien upon all of said real property."

This recital is of particular consequence upon the question of the payment out of a particular fund. The law under which the bonds were issued provides for the levy of an assessment to pay the same, and the bond

itself contains a recital to the effect that it is payable out of the fund which is to be provided in a particular way for that purpose. It amounts in effect, if not in terms, to a promise on the part of the district to pay the principal and interest of the bond at the dates therein mentioned, provided the fund out of which the payment is to be made shall have been collected.

The foundation upon which the particular fund doctrine rests seems to us to be this: The contract made or the obligation incurred by the irrigation district is not only the contract to pay a specific sum upon a specific date, but the provision of the act under which the sole authority and power to make that promise are contained, enters into and becomes a part of the promise made by the district as fully as though the entire act was itself incorporated in the bond.

The district, by the due execution of its bond, has expressly agreed to make certain payments at certain dates. It has also impliedly agreed that it will do the things required by law to be done in order to make its express promise of any value.

In the case of Hewel v. Hogin, 3 Cal. App. 248, which was an application for a writ of mandate to the treasurer of an irrigation district to pay the interest on certain bonds of the district, the court say:

> "For many years able lawyers in this state and elsewhere contended that a municipal corporation held its funds as a trustee for those having demands, for the payment of which the money was provided, and that it could not plead the Statute of Limitations against a person having a claim

which was payable out of such funds. It was argued that a municipal corporation, like a bank, was simply the custodian of special funds, holding the same for the benefit of those who were or might be entitled thereto.

"It is apparent at a glance that this contention was diametrically opposed to the contention here. The courts, however, declined to adopt that extreme, though reasonable, view, and we understand the rule to be that the defense of the Statute of Limitations is a privilege personal to the debtor, and that a municipal corporation, in common with other debtors, may waive or avail itself of such defense in any legal proceeding. (Code Civ. Proc., Secs. 1089, 1091; Bates v. Gregory, 89 Cal. 398 [26 Pac. 891]; Underhill v. Trustees, 17 Cal. 178; Barnes v. Glide, 117 Cal. 8.) But while this is the general rule, it has been pointedly held, in a case very similar to the case at bar, that 'when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the Statute of Limitations without showing that the particular fund has been provided or the method pursued.' (Sawyer v. Colgan, 102 Cal. 292.) Instead of making any such showing in the proposed amendment, or elsewhere in his pleadings, appellant affirmatively alleged that no fund was at any time provided for the payment of the interest coupons in question."

And the court in that case also cites Freehill v. Chamberlain, *supra*.

The case of Barnes v. Turner, 14 Okla. 284, 78 Pac. 108, was a proceeding in mandamus brought by the

defendants in error against the mayor and councilmen of the city of Guthrie, to compel them to levy a tax upon the property of persons residing in the territory covered by the various old provisional governments or subdivisions of the city of Guthrie to provide for the payment of certain warrants. The court say:

> "The second assignment urged by plaintiffs in error for a reversal of this case is that the action in mandamus to compel the mayor and councilmen of the city of Guthrie to levy a tax to create a fund to pay these warrants, accrued on the 9th day of September, 1895, the day W. H. Gray, receiver, commenced his action in mandamus to compel the then mayor and council of the city of Guthrie to levy this same tax for the payment of these same warrants; and that consequently, at the time of the commencement of this action, it was barred by the Statute of Limitations. With this contention we cannot agree. The Statute of Limitations is what is known in law as a statute of repose. It is a statute enacted as a matter of public policy to fix a limit in which an action must be brought or the obligation will be presumed to have been paid. The statute is intended to run only against those who are neglectful of their rights, and fail to use reasonable and proper diligence in the enforcement thereof. They are based upon the presumption of law that, from the lapse of time, it is fair to presume that the debt has been paid. In this case the warrants show upon their face that they were issued by what purports to be the city council, and signed by what purports to be the mayor, and attested by what purports to be the clerk; that they are evidences of indebted-

ness, and are entitled to be accepted as evidence of indebtedness; that they are to be paid from a special levy for the payment of city warrants under the provisions of chauter 14 of the Statutes of Oklahoma of 1890, providing for the payment of indebtedness of the provisional government of the cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill. Now, when did, under these warrants, the right to demand payment thereof accrue? Was it immediately upon the issuing of the warrants, or was it when the fund from which said warrants were to be paid was in the hands of the proper officer for payment thereof? The payment of these warrants did not depend entirely upon the action of the holders thereof, but depended upon some affirmative action on the part of the officers of the city. The issuing of these warrants, making them payable out of a certain fund to be raised by a certain levy, indicates that a duty devolved upon the officers of the city to make the necessary orders and take the necessary steps which are prerequisite to the levying and collecting of that tax. Now, can the officers of the city, when steps are taken which are necessary preliminaries to the collection of these warrants, be heard to take advantage of their own neglect of duty by saying that, because we have not performed the duty as the law required of us and made the necessary levy to provide the fund for the payment of these warrants, that consequently, on account of our neglect, the Statute of Limitations has run against the holders of these warrants so as to prevent their collection?

"We think this case comes clearly within the decision of this court in the Greer County case;

that is, Greer County v. Clarke & Courts, 12 Okla. 197, 70 Pac. 206. There this court said: 'Where the warrant is issued by the officers of a municipal, or quasi municipal, corporation, and the creditor accepts the same, relying on the ordinary modes of taxation to pay said obligation, the municipality cannot be heard to say, on an action to enforce the payment thereof, that it is barred by the Statute of Limitations, without first pleading and proving that it has provided a fund for the payment of such indebtedness. * * * Hence, a county cannot plead the Statute of Limitations to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund.' In Robertson v. Blaine County, 47 L. R. A. 459, 32 C. C. A. 512, 61 U. S. App. 242, 90 Fed. 63, it was held that a county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund without first showing that it has provided such fund. In the case of Hubbell v. South Hutchinson, 64 Kan. 645, 68 Pac. 52, the Kansas Supreme Court held that the Statute of Limitations will not start to run in favor of a city on its outstanding warrants until it has money in its treasury to satisfy such obligations. In the course of the opinion the court said: 'This action was based upon certain written obligations, and, in the absence of intervening circumstances, would become barred within five years from the date of their issuance. It is the settled law of this state, however, that the Statute of Limitations does not run in favor of a municipal, or quasi municipal corporation upon its outstanding obligations, until the corporation has provided a fund with which

payment thereof may be made.' In the case of School Dist. No. 5 v. First Nat. Bank, 63 Kan. 668, 66 Pac. 630, in a decision by the Supreme Court of the state of Kansas, we find the following language in the opinion. 'Statutes of Limitation give the defendant a right to resist the payment of a demand based upon some act of negligence or omission of the plaintiff. But in the case at bar the defendant would found its right to defeat the claim sued on by asserting its own negligence. It has never set the machinery of the law in motion to collect the money required to meet its obligations. It has remained since the debt was contracted in a continued state of insolvency, created by its own act.'

"From the foregoing, it will be seen that the reason assigned by the courts in refusing to permit the Statute of Limitations to be pleaded as a bar to recovery in cases of this character arises out of the fact that the defendants were, under the law, required to do some affirmative act,—that is, to levy a tax creating a fund for the payment of indebtedness and the taking up of warrants,—and, if the warrant holder failed to present his warrant and secure the money thereon, the Statute of Limitations could be successfully interposed. But, so long as there remained, under the law, some act to be performed by the municipality, such municipality has not performed its duty under the law, and the courts will not and ought not to permit them to interpose their failure to act as by law required as a defense to the payment of a just obligation. * * *

"Now, we think that an action in mandamus is simply a preliminary step towards the enforcing of

payment of these warrants, and, if the Statute of Limitations could not be urged as against the collection of the debt evidenced by the warrants, then it should not be urged as against the necessary preliminary steps towards the collection thereof. * * * Inasmuch as, under the law, it was the duty of the mayor and council of the city of Guthrie to levy a tax, it is wholly immaterial, it seems to us, whether the duty arises by reason of a contractual obligation, or by reason of a statute. In either case, the duty is the same. * * * The duty of the mayor and city council to levy a tax is imperative, and the principle governing the application of the law rests upon the doctrine of negligence upon the part of the city council and the mayor. * * * (Citing and quoting from Freehill v. Chamberlain, 65 Cal. 603, and Lincoln County v. Luning, 133 U. S. 529.) * * * This, it is admitted, the officers of the defendant city of Guthrie have failed entirely to do; and now they seek to interpose their negligence as a defense, and to do this under the name of the Statute of Limitations. It would seem unnecessary to further cite authorities after the decided and emphatic manner in which our own Supreme Court, in the Greer County case, has decided this question. *It would seem to us that this decision ought to settle the law upon this point in this territory."*

Plaintiff in error contends (pp. 92-93 Brief) that even assuming these bonds to be payable out of a particular fund, the creditor cannot maintain an action for a money judgment when he alleges that there is no money in the only source from which they are payable.

In this connection we desire to call the court's attention to the case of Meyer v. City and County of San Francisco, 150 Cal. 131. That was an action to recover of the defendant the amount due upon thirteen Dupont street bonds of the same issue as those involved in the cases of Mather v. City and County, and Eddy v. City and County, *supra.* No plea of the Statute of Limitations was directly involved in the case. A general demurrer to the complaint had been overruled by the court below, the defendant answered, and thereafter judgment was entered for plaintiff upon the pleadings. The appeal was from that judgment. The Supreme Court held that there was no general obligation upon the part of the defendant to pay the bonds, as they were to be paid out of a special fund to be raised by certain officers by means of a special tax. In passing upon the ruling of the lower court on the demurrer the court say:

> "No breach of duty is alleged except the failure to pay the bonds. Under the provisions of the act that duty could not arise until there had been sufficient funds raised by the special tax applicable to these bonds to pay the same. (Citing case.) This fund may or may not have been raised. It is not alleged, and it is not to be presumed."

But held that the action could be maintained not to enforce payment of the bonds but to establish and perpetuate them as a claim upon the funds to be raised under the act in order to prevent the bar of the Statute of Limitations, which, so far as appeared from the complaint, was then running, and which the

court held would not be suspended under certain specified conditions which it anticipated might be found to exist, and which were doubtless suggested by the allegations of the answer in that case. In this connection the court say:

> "But although no action could be maintained to recover a general judgment against the city for the money due on the bonds, and the complaint is insufficient to authorize a writ of mandamus, conceding that a mandamus suit to enforce payment of the bonds would lie against the city in any case, we think that the plaintiff may nevertheless maintain an action against the city on the bonds, not to enforce payment thereof, but to establish and perpetuate them as a claim upon the funds to be raised under the act, and to prevent the bar of the Statute of Limitations. At the time the action was begun but one day remained of the period of limitation. By the expiration of that period the plaintiff would have been barred forever of all right to enforce payment of the bonds, which the demurrer admits to be valid and unpaid. The delay was not the fault of the plaintiff. Circumstances might exist under which it would not be the fault of the defendant or its officers, and in which plaintiff could not force payment by mandamus,—as, for instance, if the officers, although exercising reasonable diligence, had been unable to collect the tax until after the period of limitation had run. In such a case the plaintiff would be practically without remedy if he could not maintain an action to prevent the running of the statute against him. Justice requires that he shall have some means of preventing his claim from becom-

ing outlawed. No better or more appropriate remedy can be suggested than that of an action of the character above indicated."

The answer in the case alleged, as the opinion shows, that the levies provided for in the act were regularly made each year for the twenty years as required upon all the lands of the district, and that the tax had been paid upon all of said lands, except that levied upon certain lands protected by judgments perpetually enjoining the tax collector and his successors in office from collecting from those lands any tax levied under the act. It there appeared that the city and county of San Francisco exhausted its power in its endeavor to provide the fund from which the Dupont street bonds were to be paid. In other words, if the particular fund rule applied at all, the defendant fully complied with its requirements by alleging that it had pursued the method prescribed for the raising of the funds.

In the case of Nevada National Bank etc. v. Board of Supervisors, 5 Cal. App. 638, a case in which the board of directors of an irrigation district had refused to levy an assessment to pay interest on its bonds and a writ of mandate directing the supervisors of the county to make the levy was sought, the court say:

"It seems to be established by the authorities that the proper course to pursue when municipalities refuse to pay their bonds is by an action at law to establish the validity of the bonds and the amount due thereon, and then to apply for a writ of mandate to compel the proper authorities to raise what is required to satisfy the debt by the

assessment and levy provided by statute. (Citing cases.)

Defendant cites the cases of Mather v. San Francisco, 115 Federal 37, and Eddy v. San Francisco, 162 Federal 441, as indicating that this court had departed from the rule laid down in Robinson v. Blaine County, 90 Federal 63, and also as establishing the proposition that neither the case of Lincoln County v. Lunning, *supra,* nor the particular fund doctrine is applicable to California municipal bonds. It would seem very strange that this court should make such an important ruling without so stating in express words, for in neither of the two cases cited is the special fund doctrine discussed by the court, nor are any particular fund cases even mentioned by the court. The latter case (Eddy v. San Francisco) was evidently decided upon the doctrine of laches, and the court there mentions certain facts which seem to put a special character upon the bonds there involved. After quoting certain portions of the act under which the Dupont street bonds were issued, referring to the levy, assessment and collection of taxes, the court says:

> "The duties of making these assessments and levying and collecting these taxes were purely statutory duties, created, not by municipal obligation, but primarily by a board of commissioners proceeding under a state statute. It is true the statute directed that the mayor and auditor and the city and county surveyor should constitute the board of Dupont street commissioners; but it also provided that they should each receive a compen-

sation of $2,000 for their services. The services of these officers as a board of commissioners were, therefore, not municipal services for which they were otherwise compensated, but were special services under the act of the legislature. It seems to me that the facts of this case bring it within the doctrine declared by the Supreme Court in the case of Peake v. New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, 35 L. Ed. 131, where the city of New Orleans was held to be a compulsory trustee, as distinguished from a voluntary and contractual trustee, as afterward found in Warner v. New Orleans and New Orleans v. Warner, *supra*. * * * Then after referring to the legislation which brought the city of New Orleans into relation with the drainage work and the assessments to carry it on, the court said: 'The obligations cast upon the city were purely statutory, and while they were, in respect to the party doing the work, and the collection of assessments, somewhat in the nature of a trust, they are more to be regarded as statutory obligations, a failure to discharge which puts less strain on the moral sense. * * * If ever there was a case in which the responsibility of a city should be narrowed, this is one. By the legislation of the state it was denuded of all freedom of action. It had no choice of contractor or price. Neither the property to be taxed, nor the means or method of collecting the assessments was intrusted to its discretion. This is not a case in which there was a failure on the part of the legislative body, the city council, to prescribe and provide sufficient machinery for the collection of assessments. No superintendence of the financial department or the collection thereof was intrusted

to the municipality. All this financial power was placed directly, by state action, without its consent, in one of its official boards. Thus denuded of freedom of action it may properly insist upon the narrowest limits of responsibility. If the financial duty was devolved, without its consent, upon one of its administrative boards, and such board was derelict of duty, it may properly say to a complaining party, your remedy was mandamus, to compel prompt and efficient action by that board.'

"If I am correct in my opinion that the law of the Peake case is applicable to the present case, it follows that the duty of assessing, levying, and collecting the Dupont street taxes was a statutory duty imposed upon certain officers of the city and county of San Francisco, and that the defendant was not a voluntary or contractual trustee, and is not liable as such, upon the facts stated in the bill of complaint."

We respectfully submit that neither the case of Mather v. City and County, nor the later case of Eddy v. City and County, militate in any way against the authority of Robertson v. Blaine County, *supra.*

It may also be interesting to note that the Dupont street bonds were a legal tender in payment of taxes (Sec. 13, St. Cal. 1875-6, page 440) as in the case of Goldman v. Conway County, 10 Fed. 888, cited by counsel on page 138 of their brief, and further that the Dupont street fund, while special as to the city and county of San Francisco, was the only fund of the district created by the statute authorizing the issuance of the bonds, into which fund went all moneys of the

district, whether arising from the sale of bonds or collection of taxes, and from which were paid all warrants for damages, expenses of widening the street, etc., and the principal and interest on these bonds.

On page 68 of their brief counsel complain of the decision in the court below because they say that numerous irrigation districts in the state of California have proven dismal failures and that many of the issues of bonds were acquired by present holders at a tremendous discount from the original holders. It is not within the limits of our understanding to conceive that they contend any such facts to exist in this case. The undisputed evidence here shows that the bonds sued upon were given for water and pipe lines furnished the district. In fact, it is admitted and stipulated by plaintiff in error,

"that the consideration that said district received for the bonds issued and which the bonds mentioned in this suit are a portion, was six hundred and fifty inches of water, pipe lines, rights-of-way and other property and easements used in connection therewith. * * *" [Tr. p. 52.]

These have been in use for twenty years and no complaint as to their efficiency or value has ever been suggested in this case.

The evidence also shows that the lands of the Rialto Irrigation District by means of the water and pipe lines so purchased with these bonds were from a desert converted into one of the most prosperous communities in Southern California with values of millions.

We quote from the testimony of the defendant in error, which is not attempted to be contradicted:

"I am acquainted with the property owned by the district. I value the water rights at $925,000.00 for six hundred and fifty inches of water and the pipe lines and pipe system at $175,000.00." [Tr. p. 53.]

And again:

"There are about seventy-eight hundred acres in the district, and when this pipe line was first constructed the land was desert land and was hardly worth fifteen dollars an acre. There is now over three thousand acres which is worth easily $1,000 an acre, and the balance of the district is worth $200 to $250 an acre, making an aggregate value of over $4,000,000 in the district." [Tr. p. 58.]

Counsel also complain that if the defendant in error here recovers what is justly due him, it can only be upon a theory which will entitle holders of bonds of other districts, which have been acquired by present holders at a discount, to come forward and assert their claims. We fail to perceive how this can affect the rights of the defendant in error, even conceding it to be true. Defendant in error here has been asserting his right to payment of these bonds for many years. The plaintiff in error on or about the 1st of January, 1895 (four years after the issuance of these bonds), ceased to have sufficient funds with which to pay, and passed a resolution to the effect that it would thereafter pay interest upon all overdue interest coupons from the time they became due until paid by said

district. [Stipulation, Tr. p. 52.] In 1900 the original complaint was filed in the case of Stowell v. Rialto Irrigation District in the Superior Court of San Bernardino county. The lower court decided the bonds to be invalid. This decision was reversed by the Supreme Court of California in 1909. The original complaint in the present action was filed in the lower court in 1908. Two other suits are pending between these parties in this court, which by stipulation [Tr. p. 44] are to follow the decision in the case at bar. One of those suits was filed previous to the case at bar and the other filed subsequently. Each case involves different installment and interest coupons from the same bonds. Demurrers, motions and the final decisions have been submitted upon briefs in these cases. The defendant in error has not been sleeping upon his rights. The irrigation district has been at all times vigorously contesting the right of recovery on these bonds by every conceivable technicality known to the law, and if we may be permitted to use the language of plaintiff in error, "with a force sufficient to deceive the very elect."

We think that very appropriate and applicable here is the language of Judge Bledsoe, now United States district judge, then presiding in the Superior Court of Riverside county, in referring to the general situation regarding irrigation districts that is part and parcel of the history of the state of California. The court, after passing upon a technical contention that the Wright Act was unconstitutional, says:

"In this connection it should be kept in mind that very soon after the 'Wright Act' of 1887 was adopted—it being the progenitor of the act here involved—a large number of irrigation districts were organized pursuant to the terms of such act; that thereafter, in due course, bond issues of most magnificent proportions were voted, *and that thereafter when the inevitable pay day came around, a more or less general disposition was evinced to adopt whatever means might be necessary to avoid the payment of many of the bonds which were theretofore in times of great hope and expectation duly authorized.* This disposition reflected itself in the neglect and refusal of districts to continue their corporate organization by failing to elect such officers and directors at the close of their terms, as provided by law, and thereby put it out of their own power to perform the duties and conform to the obligations imposed upon them through the machinery provided by law."

Written opinion of the court filed in action of N. H. Twogood *et al.* v. Board of Supervisors of Riverside County, dated April 2nd, 1914.

Counsel attempt to throw a cloud of legal mystery around the main issues involved in this case, but when the light of reason is let in their contentions fade away, and it becomes apparent that to hold these bonds or coupons outlawed would be to violate the principle of the decisions rendered before the bonds were issued and which have ever since been consistently followed by both state and federal courts, and would take away vested rights of those who have dealt in these securi-

ties upon the faith of the doctrine so established—a doctrine supported by *stare decisis* and, we believe, correct in the reasons upon which it is based.

The following quotation from the case of Tulare Irrigation District v. Shepard, 185 U. S. 1, 46 L. Ed. 773, also seems applicable here:

> "In the case of Douglas County v. Bolles, * * * a case involving facts somewhat similar, this court said: 'Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by the lapse of time, and we think it applies in its full strength to this case."

Plaintiff in error has set forth on pages 141 to 147 of its brief a statement of the amount of our claim which it contends is barred by the provisions of the Statute of Limitations. We do not think it necessary for the court or for us to verify this statement, for the reason that a reversal would involve the entry of a different judgment by the court below, and if this court should lay down a general rule, it would be a mere matter of detail to prepare a new judgment in accordance with that rule.

While, as stated by counsel, we did call the attention of the court below to the distinction between the method of the administration of the remedy of mandamus in the state and federal courts, and while the court recognized that distinction, nevertheless, it held the bonds involved here to be within the particular fund rule, and it is upon that broad doctrine that we here base our right to an affirmance of that judgment.

Date of Issuance of Bonds as Affecting Their Validity.

Plaintiff in error contends that the bonds are invalid because they do not bear date at the time of their issuance and do not run for the term prescribed by the statute. Although this was the precise point settled by the Supreme Court of California in the case of Stowell v. District, 155 Cal. 215, an action in which the defendant in error here brought suit against this same district upon bonds of the very issue here involved, plaintiff in error makes the contention that the court in that case in deciding this point passed only upon matters appearing on the face of the bonds.

Portions of the transcript in the case of Stowell v. District, *supra,* were by stipulation introduced in evidence in the case at bar and are contained in the transcript filed herein. [Page 58 *et seq.* of Transcript.] The testimony in the case of Stowell v. District, *supra,* showed deliveries of the bonds from 1895 to 1897, inclusive. [Page 60, Tr.] The finding of the lower court in that case as to the time of delivery of the bonds was as follows:

"Said alleged bonds were signed by the president and secretary of defendant on or about December 21, 1890, and none of them were signed prior to that date; and some of said bonds were disposed of and delivered in the manner hereinafter found, on or about December 22, 1890, and some of them subsequent to that date, and none of them were disposed of or delivered prior to December 22, 1890."

With this finding before it, and the evidence upon which it was based, the Supreme Court of California says:

> "The points made by respondent are that the bonds do not 'bear date at the time of their issue,' as required by the act, and that they were made payable at periods longer than those authorized by the statute."

And after stating that the interest did not begin to run on the bonds until January 1st, 1891, and that the installments of principal were made payable in the required periods after that date, the court holds that the issuance of the bonds in that form and manner was a substantial compliance with the statute.

Counsel's whole argument upon this point is founded upon an erroneous conception of the true meaning of the word "issued" as used in the Wright Act. In statutes similar to the one under consideration this word is used in two distinct senses. Bonds are sometimes said to be "issued" when they have been merely authorized and prepared, with the date from which they are to run. When they are actually delivered to a purchaser they are said to be "issued" to him. The case of Yesler v. City of Seattle, cited by the Supreme Court in Stowell v. District, is very clear on this proposition. The case is reported in 25 Pacific 1014. The Supreme Court of Washington, speaking through Justice Stiles, says:

> "The statute requires that such bonds shall 'bear the date of their issue,' and it has become a question in this case what the date of issue is,

since the bonds were prepared with the date July 1, 1890, * * * although none of the bonds have been delivered, and some of them will not be delivered for many months. In financial parlance the term 'issue' seems to have two phases of meaning. 'Date of issue,' when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery, and we see no reason why the Act of March 26, 1890, should not have that interpretation. When the bonds are delivered to the purchaser, they will be 'issued' to him, which is the other meaning of the term."

The case of Sechrist v. District, 129 Cal. 640, is not contrary to this doctrine. That was an action instituted by taxpayers and landowners of the district to have bonds of the district declared invalid. The contention was made by defendants, holders of the bonds, that the action was barred by the Statute of Limitations since the bonds were "issued," to the extent of being authorized and prepared, in December, 1890, and the suit had not been commenced until seven years thereafter. But the court held substantially on this point that since the right of action against the holders to have the bonds adjudged void did not accrue to a landowner or taxpayer of the district until those bonds were delivered, the bonds were not "issued to the holders" so as to start the running of the statute until they were delivered. The court in that case was not

called upon to construe the word "issued" as used in the Wright Act, and the court's attention was not directed to the construction which necessarily must be placed upon that term as there used in order that effect may be given to all of the provisions of the act, but on the contrary the court was concerned only with the proposition that the bonds had not been "issued to the purchasers" so as to start the running of the Statute of Limitations to bar an action against such purchasers. Anything further than this in the decision is dictum solely, as is made evident by the subsequent decision of Stowell v. District, above, in which the question as to whether the bonds bore the "date of their issue" was directly before the court. In that case the court decided the point upon the theory that the date of issue was the time when the bonds commenced to run, and the court did not take into consideration the date of delivery in determining the date when the bonds were "issued," within the meaning of the statute. The court, after stating that the language in the body of the bond, if it stood alone, would make the installments of principal payable at the end of the respective periods named from and after November 17, 1890, and that if this date was to be taken as the date of issue of the bonds, the installments of principal would be made payable at a time later than that fixed in the Act for the payments, says:

> "But in determining the true effect of any written instrument, the entire writing must be considered. Here we find that, while the nominal date of November 17, 1890, is stated in the bond,

the first payment of semi-annual interest fell due on July 1, 1891. The bonds, therefore, did not begin to bear interest until January 1, 1891, and the installments of principal were made payable in the required number of years after that date. Under these circumstances, the bonds are to be regarded as, in effect, *issued* on January 1, 1891, which may be treated as their real date, in contradistinction to the nominal date of November 17th, 1891. That the execution and issuance of the bonds in this form and manner was a substantial compliance with the statute, both as to date and term of running, is a view well sustained by authority."

The "issue" of bonds referred to in the Wright Act clearly includes only the authorization of the bonds, their preparation, and the date from which they are to run. This is made clear by the language of the act:

"At such election the ballots shall contain the words 'Bonds—Yes,' or 'Bonds—No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds—Yes,' *the board of directors shall immediately cause bonds in said amount to be issued.* * * * They shall be numbered consecutively as issued, and bear date at the time of their issue."

Section 15.

"The board may *sell* said bonds *from time to time,* in such quantities as may be necessary and most advantageous to raise money. * * *"

Section 16.

It thus appears that there was no limit placed by law on the time when the bonds might be sold and delivered, although they must be issued to the full amount immediately after the election so that they will be ready for sale. The act contemplates that the district must have time after the issuance of the bonds in which to place them on the market, find purchasers, sell and deliver them, and so provides that they may be sold from time to time.

If the contention of defendant be correct that "issued" as used in the Wright Act refers to delivery to a purchaser for value, it would be difficult to understand how the board could "sell said bonds from time to time" if they are also to comply with the provision of section 15 of that act, that upon receiving the result of the election in favor thereof they "shall immediately cause bonds in said amount to be issued." Such an interpretation of that term as used in the Wright Act would also make it possible for the bonds to bear different dates and mature at different times, since the act provides that they may be sold from time to time, and defendant contends that they must be dated at the time of delivery. But an examination of the act itself shows that it was not intended that the bonds should be payable at different dates. The act provides:

> "Said bonds shall be payable in gold coin of the United States, in installments as follows, to-wit: At the expiration of eleven years not less than five per cent of said bonds; at the expiration of twelve years not less than six per cent. * * *

and for the twentieth year a percentage sufficient to pay off said bonds. * * *"

Section 15.

"The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds; and *at the expiration of ten years after the issuing of bonds by the board, must increase said assessment for the ensuing ten years, in the following percentage of the principal of the whole amount of bonds then outstanding,* to-wit, for the eleventh year, five per cent; for the twelfth year, six per cent; * * * and for the twentieth year a percentage sufficient to pay off said bonds. * * *"

Section 22.

Assuming that defendant's contention be correct, that the bonds must be dated at the time of delivery and must run from that time, and for the purpose of illustration suppose that the board of directors under the authority conferred by the Wright Act to sell the bonds from time to time, deliver and, therefore, date some of the bonds in 1891, and sell, deliver and date others in 1900—we then have this state of affairs: the board of directors in conformity to the provisions of section 22 above quoted, in the twentieth year after the delivery of the bonds, which would be in 1911, must levy an assessment sufficient to pay off the whole amount of bonds then outstanding, though the bonds delivered in 1900 have still about ten years to run. Such an interpretation would defeat the obvious intention of the legislature, which was to levy each year

only an amount sufficient to pay off the accrued interest and the matured installment of principal.

The only construction of the term "issued" as used in the Wright Act which is consistent with and gives effect to all of the provisions of the act is that which limits the meaning of the word to the authorization and preparation of the bonds, including the date from which they are to run. When the bonds are sold from time to time, after being issued, the question of the payment of principal and interest which may have matured between the date of issue and the date of sale must be adjusted by payment of the face of the bond and interest by the purchaser or the removal of the matured coupons, as was done in the case at bar.

In a case decided in 1897 the Supreme Court of California clearly states a proposition showing that "issue" and sale of bonds are two different matters. The case is In the Matter of the Organization, etc., of the Central Irrigation District, 117 Cal. 382. The action was instituted under the Confirmation Act, to confirm proceedings taken under the Wright Act, and as the district had already sold some of the bonds and had delivered them and the bonds had passed into the hands of *bona fide* holders, and as these bondholders were not parties to the action the court refused to pass upon the validity of the bonds themselves, and said:

> "The Confirmation Act contemplates a review by a court of the proceedings attending the issue of bonds, whether the bonds have actually been sold or not. *After the issue, and before the sale,* of any bonds it may well be of advantage to the

district and to intending purchasers that the judgment of a court should be invoked to pass upon the regularity of the action of the district officers, but after sale different questions present themselves."

That the legislature of California has kept well in mind the distinction between "issue" and sale or delivery is evidenced by the language of the act passed in 1897, and which is really supplementary to the Wright Act. This act (Stats. 1897, p. 394) provides substantially that irrigation districts which have been organized under the Wright Act and which have bonds, coupons, or other evidences of indebtedness outstanding, may fund the same by a new issue of bonds, to be delivered in lieu thereof. Section 12 of this act provides:

> "It shall be unlawful to *sell* or exchange any of the bonds *issued* as herein provided, for less than their par value."

Plaintiff in error makes the point that some of the bonds in question were delivered under an agreement, which provided that certain property should remain the property of N. W. Stowell until the bonds received, or to be received, shall have been paid, and that therefore the bonds delivered under this agreement are void. This point is made under point 3, pages 158-161, of their brief.

We submit that plaintiff in error cannot raise this question in view of the stipulation appearing upon pages 52 and 53 of the transcript of record. This stipu-

lation was entered into prior to the trial of the case, and contains the following provision:

"That the consideration that said district received for the bonds issued and which the bonds mentioned in this suit are a proportion, was six hundred and fifty inches of water, pipe lines, right of way and other property and easements used in connection therewith."

The contract to which reference is made, together with other documentary evidence, was taken from the transcript in the case of Stowell v. Rialto Irrigation District in the Supreme Court of the San Bernardino county [Transcript, page 73], which was subsequently disposed of by the decision of the Supreme Court of the state of California, appearing in 155 California, page 115; and this particular contract, together with the other documentary evidence offered from the said transcript, was offered as we supposed for the purpose of showing the manner in which property was transferred to the district.

The proposition made by the plaintiff in error under point 3 was not made in the lower court, and we submit that in view of the stipulation it cannot be made here. Further, notwithstanding the contract referred to by plaintiff in error, there is nothing in the record to show that the title to the particular property described in that contract has not passed to the district, and under the stipulation it should be assumed that the district had received the consideration mentioned in the stipulation. Again this particular contract was before the Supreme Court of California in the case

referred to and that court held the bonds issued by the district valid.

Under Point IV counsel say that the court erred in rendering its findings and judgment for the reason that no judgment of the Superior Court declared these bonds to be valid.

If we understand the position of counsel it means that the confirmation provided for by statute is necessary for the validity of the bonds.

The act providing for the confirmation of proceedings for the issue and sale of bonds appears in the statutes of California of 1889, page 212. Section 1 of that act provides that the board of directors of an irrigation district *may* commence a special proceeding for the purpose of having the proceedings for the organization of the district and the sale of the bonds judicially determined, but it nowhere appears that such action is in any way a prerequisite to the validity of the bonds. Even if it should be assumed that the objections made to the manner in which the judgment of confirmation was obtained were well taken, it would not follow that the validity of the bonds were thereby affected.

Counsel say that as the confirmation action was filed December 12, 1890, none of the bonds in suit were then in existence. It does not lie in the mouth of the Rialto Irrigation District to make such a statement. The facts are briefly these: the board of directors of the district did issue the bonds sued on—

"The defendant * * * by its board of directors

* * * issued a bond of said district * * * in words and figures following." (Copy of bond follows bearing date November 17th, 1890.) [Amended complaint, Tr. pp. 19-22.]

"Admits that the board of directors and officers of the defendant acting in the name of the defendant issued the bonds referred to in said amended complaint." [Answer to amended complaint, Tr. p. 33.]

Upon the 12th day of December, 1890, this very district which is now alleging that its bonds are invalid filed in the Superior Court of San Bernardino county, California, its petition wherein it asked that the validity of its bonds be determined, and on the 8th day of January, 1891, it procured the entry of a judgment of that court [duly given, made and entered, Tr. p. 121] to the following effect:

"That all proceedings which might affect the legality or validity of said bonds * * * have been examined and determined by the court and that all of said proceedings were legal and valid and confirmed." [Tr. p. 122.]

The district admits the issuance of a bond bearing on its face a date prior to the filing of its own petition for confirmation, and we do not think that this court is going to indulge the presumption that the Superior Court of San Bernardino county stultified itself by adjudging the validity of all proceedings which affect the validity of the bonds when it did not have the bonds before it.

This question of the validity of the bonds as affected by their date and the time of their maturity is discussed elsewhere, but independent of that, we submit that the plaintiff in error is estopped by its own conduct in obtaining a decree of court establishing the validity of these bonds, a public record which was notice to the world and which it is to be presumed was relied upon by the purchasers, from now asserting that it was not entitled to that decree. The repudiation of an obligation honestly entered into seems to necessitate the taking of many inconsistent positions by the repudiator.

We do not discuss the points made by counsel in reference to the invalidity of the bonds in the hands of the defendant in error because the only defects relied upon are those claimed to have arisen out of the method by which this defendant in error acquired them or those which appear on the face of the bonds themselves, which, of course, would be available no matter how they were acquired.

We respectfully submit that the judgment should be affirmed.

J. W. Swanwick,
Attorney for Defendant in Error.